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**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

IN RE PACIFIC FERTILITY CENTER
LITIGATION

Master Case No. 3:18-cv-01586-JSC

**PLAINTIFFS' TRIAL BRIEF REGARDING
DEPOSITION TESTIMONY AND EXHIBITS
FOR MAY 25, 2021**

This Document Relates to:

No. 3:18-cv-01586

(A.B., C.D., E.F., G.H., and I.J.)

1 Plaintiffs have designated 2 hours and 27 minutes of testimony from seven witnesses that they
 2 would like to play for the jury on Tuesday, May 25, 2021. In response, Chart objected to Plaintiffs
 3 playing 13 minutes of testimony from Ramon Gonzalez; counter-designated 4 hours and 7 minutes of
 4 testimony; and objected to the jury seeing 10 exhibits that were discussed by the witnesses during their
 5 depositions. Plaintiffs briefly address the global issues raised by Chart's response below. In addition,
 6 both parties' designations and line-by-line objections are attached hereto as Exhibits A-G.

7 **A. The deposition testimony of Ramon Gonzalez should be permitted.**

8 Chart objects to Plaintiffs playing brief excerpts from Mr. Gonzalez's deposition testimony
 9 because he was not included on Plaintiffs' original witness list. When that witness list was submitted,
 10 however, Chart had designated two former employees, Seth Adams and Buster Ingram, who would be
 11 appearing for live testimony, and had agreed both witnesses would be available for Plaintiffs to call live
 12 in their case in chief. The Court subsequently ordered that Chart make one of its current employees,
 13 Brandon Wade, available for live testimony via Zoom. It was not until Tuesday, May 18, 2021, that
 14 Plaintiffs learned none of these Chart witnesses would in fact be testifying at trial and that Plaintiffs
 15 would instead need to rely exclusively on prior deposition testimony.

16 So while Plaintiffs previously had seen no need to use Mr. Gonzalez's deposition testimony
 17 other than for impeachment—given that the issues and documents he had discussed during his
 18 deposition could be raised with the Chart witnesses who were set to testify live—that changed when
 19 Plaintiffs learned no Chart witnesses would be appearing at trial after all. For example, Ramon
 20 Gonzalez was asked about an email at his deposition that stated Chart's new controller had the issues
 21 that plagued its TEC-3000 controller—and caused the SN=0 defect—“designed out of it at the board
 22 level.” (Trial Ex. 197.) If Chart still had live witnesses appearing at trial, those witnesses could have
 23 been asked about the document and testified that Chart had designed the SN=0 defect out of its
 24 retrofitted controller. If they refused, Mr. Gonzalez's deposition testimony could have then been
 25 introduced for impeachment purposes. But without live witnesses, that method of getting the “designed
 26 out at the board level” document into the record is no longer feasible. The only effective way of
 27 introducing that important document into evidence is now to read Mr. Gonzalez's prior deposition
 28 testimony about the document into the record.

1 Because the need for Mr. Gonzalez's deposition testimony has only just arisen, the fact that he
 2 does not appear on the witness list the parties submitted over a month ago should not preclude Plaintiffs
 3 from offering Mr. Gonzalez's testimony now. Rule 37(c)(1) provides that if a party fails to identify a
 4 witness, the party is not allowed to use that witness to supply evidence at a trial "unless the failure was
 5 substantially justified or is harmless." Here, Plaintiffs' failure to identify Mr. Gonzalez before last
 6 Thursday was substantially justified. Not until Plaintiffs learned that Chart witnesses would not be
 7 appearing in person as previously represented, did it become necessary for them to play a small portion
 8 of Mr. Gonzalez's deposition testimony for the jury. Identifying Mr. Gonzalez now is also harmless, as
 9 Chart may counter-designate his deposition testimony if it wishes—Plaintiffs do not anticipate that his
 10 deposition will be played until Tuesday, May 25 at the earliest.

11 In addition, none of the factors that courts are required to consider when determining whether to
 12 exclude the testimony of previously unidentified witnesses favor exclusion of Mr. Gonzalez's
 13 deposition testimony. *See Reno Air Racing Ass'n., Inc. v. McCord*, 452 F.3d 1126, 1139–40 (9th Cir.
 14 2006). Chart will not be prejudiced if Plaintiffs play 13 minutes of Mr. Gonzalez's deposition: Chart's
 15 counsel was present during that deposition, the exhibits that Mr. Gonzalez is discussing were identified
 16 in Plaintiffs' exhibit list, and if Chart was making Mr. Adams or Mr. Ingram available to Plaintiffs at
 17 trial—as they previously represented they would—the same testimony could have been elicited from
 18 them or used for impeachment. Playing Mr. Gonzalez's testimony also would not disrupt the orderly
 19 and efficient trial of the case. Due to Chart's manipulation of witness availability, hours of deposition
 20 testimony from several prior depositions was already going to be necessary. Adding 13 more minutes
 21 of deposition testimony to that video presentation should make little practical difference, and is needed
 22 to ensure the jury is able to review evidence that can only be introduced through Mr. Gonzalez's
 23 deposition. The late addition of Mr. Gonzalez is not the result of a willful failure to comply with Court
 24 orders; it is the result of the sudden unavailability of other Chart witnesses. Plaintiffs accordingly
 25 request that the Court overrule Chart's objection and permit Plaintiffs to play approximately 13 minutes
 26 of Mr. Gonzalez's deposition testimony for the jury.

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1 **B. Chart's counter-designations are excessive, calculated to confuse the jury, and should
2 largely be played separately from Plaintiffs' shorter designations.**

3 The testimony that Plaintiffs intend to play for the jury consists of relatively short and targeted
4 excerpts from the depositions of six Chart witnesses and one Extron witness. They range in length from
5 4 minutes to 41 minutes, and average about 20 minutes per witness. Because no Chart witnesses will be
6 testifying live at trial, the primary intent of playing these depositions is to enter internal Chart
7 documents into evidence, along with Chart's explanation of the documents' significance.

8 Chart has countered with much longer excerpts that largely do not address the same subject
9 matter and appear calculated to distract from the exhibits and testimony Plaintiffs wish to introduce by
10 surrounding them with hours of irrelevant and confusing material. For instance, Plaintiffs wish to
11 provide the jury with 20 minutes from Seth Adams' deposition, but Chart wants to dilute that testimony
12 by adding over an hour and a half to the video that the jury sees. And while Plaintiffs intend to show
13 the jury only 19 minutes from Jeff Brooks' deposition, Chart wants to surround that testimony with
14 nearly an hour of additional, largely unrelated testimony.

Witness	Plaintiffs' Designations	Chart's Designations
Seth Adams	20 mins	1 hr, 34 min
Jeff Brooks	19 mins	52 mins
Kyle Eubanks	29 mins	5 mins
Ramon Gonzalez	13 mins	-
Justin Junnier	41 mins	45 mins
Gregory Mueller	4 mins	26 mins
Brendon Wade	21 mins	25 mins
Total	2 hrs, 27 mins	4 hrs, 7 mins

25 Chart has already prejudiced Plaintiffs' case by denying them access to live witnesses who it
26 had previously represented would be attending the trial proceedings and by refusing to make even
27 current employees available for live testimony. To avoid further prejudicing Plaintiffs' ability to enter
28

1 internal Chart documents into evidence in an effective manner, Plaintiffs request that Chart be directed
 2 to play most of its much longer video excerpts separately from Plaintiffs' excerpts.

3 This could be accomplished by playing Plaintiffs' excerpts as a "direct examination," and then
 4 instructing the jury that additional excerpts will be shown as Chart's "cross examination." Or it could
 5 be accomplished by requiring Chart to play most of its excerpts during its case-in-chief, where it will be
 6 clear that Chart is offering the testimony for a different purpose and in support of its defense. Had Chart
 7 produced live witnesses, it would have made sense to complete both side's examination of the witness
 8 in one sitting—both for the convenience of the witness and to reduce the risk of any potential COVID
 9 exposure. But with video testimony, those concerns are not present. Chart would suffer no prejudice if
 10 required to play its video excerpts during its own case-in-chief, and Plaintiffs' video excerpts will make
 11 far more sense to the jury if they are not diluted by confusing and mostly unrelated testimony.

12 Where Chart is merely extending Plaintiffs' designations by a few lines while still addressing
 13 the same exhibit or topic, Plaintiffs have no objection to playing Chart's counter-designations at the
 14 same time as Plaintiffs' designated testimony. But where Chart is adding large segments of unrelated
 15 testimony regarding other exhibits or topics than those addressed in Plaintiffs' designated testimony,
 16 Plaintiffs believe it would be inappropriate and confusing to the jury to mix the two.

17 **C. Chart's objections to Plaintiffs' exhibits should be overruled.**

18 Out of the 16 exhibits that Plaintiffs intend to introduce into evidence through the Chart and
 19 Extron deposition testimony, Chart objects to 10 of them. Even though the Court has repeatedly denied
 20 Chart's attempts to exclude its own failure-modes analysis and its own emails about the SN=0
 21 controller defect, Chart continues to make the same objection. Plaintiffs request that the Court deny
 22 Chart's "other occurrence" objection to these exhibits as well.

23 **1. Exhibit 192**

24 Exhibit 192 is Chart's Design Failure Mode Effects and Criticality Analysis (DFMECA), which
 25 contains a pre-litigation admission that the type of cracked weld Tank 4 suffered would cause exactly
 26 what happened to Tank 4. The Court has already overruled Chart's objection to Exhibit 192. (5/19/21
 27 Order at 2, EF No. 806.)

1 **2. Exhibit 208**

2 The Court has also already overruled Chart’s objection to Exhibit 208. (5/19/21 Order at 2, EF
 3 No. 806.) Plaintiffs request that it do so again and direct Chart to refrain from re-raising objections that
 4 have already been ruled on.

5 **3. Exhibit 216**

6 Exhibit 216 is another branch of the email chain found in Exhibit 217, which the Court has
 7 already ruled is admissible. (5/19/21 Order at 2, EF No. 806.) Exhibit 216 contains four of the same
 8 emails as Exhibit 217, plus three additional emails, where Chart reiterates that the SN=0 issue was
 9 increasing globally in 2015, that when Chart offers replacements they come up with the same issues,
 10 and that neither Chart nor its supplier had a solution to the problem. As the Court found with respect to
 11 Exhibit 217, “These emails are relevant to Chart’s knowledge of a defect with the controller and as they
 12 are emails between Chart employees, to the extent they are offered for the truth of the matter, they are
 13 admissible as statements of an employee of a party opponent.” (*Id.*)

14 **4. Exhibit 284**

15 Exhibit 284 consists of two emails from Chart employees. One email reports that Chart “just
 16 lost a large quantity of freezer sales in Europe because of TEC3000 issue,” and both emails describe
 17 that issue as the serial number and liquid nitrogen level dropping to zero all of a sudden—exactly what
 18 happened to Tank 4. The emails are relevant because they show that Chart was aware of that issue way
 19 back in 2015 but failed to address it through a recall or retrofit campaign. One email also states that
 20 “Chart hierarchy” wanted answers, which indicates that one or more officers, directors, or managing
 21 agent knew about Chart’s failure to recall its defective controllers and adopted or approved that
 22 failure—a required element of Plaintiffs’ claim for punitive damages. (*See* Joint Proposed Jury
 23 Instructions at 32, Stipulated Instruction No. 20, ECF No. 762.)

24 **5. Exhibit 200**

25 Exhibit 200 is another string of emails from Chart employees regarding the SN=0 issue that
 26 afflicted Tank 4. Chart employee Brendan Wade’s email confirms the issue being discussed is SN=0:
 27 he states that many of the returned controllers he examined in 2015 had lost their serial number and that
 28 “this is only a fraction of the total controller returns.” (Trial Ex. 200 at 4551.) And a Quality Analyst at

1 Chart, Daphne Maddox, reports that Chart's upper management will want to know why Chart had to
 2 replace 10 TEC 3000 controllers for a single customer at the same time and that she will make sure
 3 everyone is aware of the controller issue—again suggesting that one or more of Chart's officers,
 4 directors, or managing agents knew about the SN=0 defect and approved of Chart's failure to address it
 5 through a recall or retrofit. (*Id.* at 4551, 4553.)

6 **6. Exhibit 197**

7 Exhibit 197 consists of two more Chart emails concerning the SN=0 issue. Chart employee
 8 Brendon Wade confirms the email string concerns the same issue experienced by Tank 4: "the SN
 9 going to zero on the TEC 3000," where "the freezers spontaneously read 0" of liquid [nitrogen] and
 10 temps are way off." (Trial Ex. 197 at 2854.) And Chart employee Alex Burnett reports that Chart's
 11 "new touch-screen controller has these issues designed out of it at the board level." (*Id.* at 2855.) This
 12 shows not only that Chart was aware of the SN=0 issue in 2016, but that it was already working on a fix
 13 that it could have used to retrofit existing controllers.

14 **7. Exhibit 225**

15 Exhibit 225 is a 2017 email from Chart employee Justin Junnier, who states that it is not that
 16 crucial for Chart to figure out the range of the interference issue behind SN=0 because the touch screen
 17 controller was due to be launched later that year. In his deposition testimony concerning the email, Mr.
 18 Junnier explained that "[i]t was our thought process that this touch screen controller would be the end --
 19 hopefully the end-all, be-all to fix these interference issues." (Junnier Dep. at 94-95.) He also admitted
 20 that Chart had upgrade kits available that Chart could have used to retrofit existing TEC-3000
 21 controllers, but that Chart did not do so. (*Id.* at 95-96.) The exhibit and Mr. Junnier's testimony are
 22 therefore relevant to show that Chart had the ability to retrofit Tank 4's defective controller but chose
 23 not to do so, which a jury could find constituted a negligent failure to retrofit under the circumstances.

24 Elsewhere Chart has objected that the touch screen controller is irrelevant because it was "not
 25 yet available for Chart customers as of March 2018." (See Adams Dep. at 25, Defense Objections.) But
 26 Chart has previously admitted that the "TEC3000 to Touch Screen Upgrade Kit (Part Number
 27 21127230) was available for purchase as of January 1, 2018." (Trial Ex. 5, Answer to RFA #1.) And
 28 Ramon Gonzalez testified during his deposition that the touchscreen controller went to market around

1 May 2017. (Gonzalez Dep. at 34.) Notably, Chart did not receive SN=0 complaints about that upgraded
 2 controller.

3 **8. Exhibit 266**

4 Exhibit 266 is an email string concerning “a spate of TEC3000 controllers in Australia going
 5 into the error of not showing any level on the display.” (Trial Ex. 266 at 67352.) Chart employee Justin
 6 Junnier responded by telling a Chart Industries employee that electrical interference issues may be
 7 responsible and suggested the customers check whether the controller was still displaying the correct
 8 serial number. (*Id.* at 67350, 51.) When asked at his deposition whether he was concerned by these
 9 controller malfunctions, Mr. Junnier responded that he “was not necessarily in alarm … [for lack] of a
 10 better term, wigging out, if you will, because those freezers can maintain LN2 and temperature for quite
 11 a while, for weeks on end.” (Junnier Dep. at 72-73.) That response undermines Chart’s contention that
 12 PFC acted negligently and irresponsibly when it had a similar response to Tank 4’s malfunctioning
 13 controller. Like Mr. Junnier, PFC believed it wasn’t essential to immediately replace Tank 4’s
 14 malfunctioning controller because Tank 4 could maintain its liquid nitrogen level and temperature for
 15 weeks on end. Had Mr. Junnier or PFC been told that an interior weld could crack and immediately
 16 compromise the tank’s ability to maintain its liquid nitrogen level and temperature, they surely would
 17 have responded differently. But Mr. Junnier’s response shows that PFC’s belief was not necessarily
 18 unreasonable under the circumstances as PFC understood them.

19 **9. Exhibit 220**

20 Exhibit 220 is similar to the prior exhibit in that it reports that a customer’s TEC-3000
 21 controller was “reading 0” of liquid [nitrogen] when there was actual liquid in the freezer” and both
 22 temperature probes were reading -273°C. (Trial Ex. 220 at 20479.) Chart employee Justin Junnier
 23 responded that “we were able to determine the TEC 3000 was malfunctioning due to electrical
 24 interference,” (*Id.* at 20476.) When asked at his deposition whether the malfunctioning controller was
 25 concerning given that the product stored inside the tank was “irreplaceable,” Mr. Junnier reiterated that
 26 he was only somewhat concerned because “then again, if these samples were in the freezer, if there is
 27 LN2 in the freezer, that can last for a couple of weeks.” (Junnier Dep. at 83.) As with the prior exhibit,
 28 this exhibit and Mr. Junnier’s reaction to it are relevant because they tend to undermine Chart’s

1 contention that it was unreasonable for PFC to respond similarly to its malfunctioning controller rather
 2 than replace it immediately.

3 **10. Exhibit 263**

4 Trial Exhibit 263 (CHART062204-213) is an email chain between Chart and one of its
 5 authorized distributors that was cited in Plaintiffs' Opposition to Chart's Motion for Summary
 6 Judgment. (*See* ECF No. 673-04 (Pls. MSJ Opp.) at 7.) The distributor wrote "two consecutive HECO
 7 units experience VACUUM FAILURE in [city]! Wow, I have never seen this before. ... This is very
 8 serious and we don't want this to get around." (Trial Ex. 263 at CHART062211.) Chart employee
 9 Justin Junnier agreed, replying, "This is definitely an unusual circumstance." (*Id.*) Chart objects that the
 10 HECO units at issue in that email are not substantially similar to Tank 4, which is an MVE 808 model
 11 tank. But Plaintiffs are not introducing the document to prove that Tank 4 and the HECO units in Texas
 12 suffered from a common defect. They are introducing it to support their claim that ordinary users of
 13 cryogenic tanks do not expect a tank to lose vacuum overnight. That is relevant under the consumer-
 14 expectations test for a design defect. (*See* Joint Proposed Jury Instructions at 32, Disputed Instruction
 15 No. 4, ECF No. 762.) And it is also probative of Chart's contention that PFC's negligence caused or
 16 contributed to the March 4th incident. If Chart admits that it is "definitely an unusual circumstance" for
 17 a vacuum to fail overnight and implicitly agrees "we don't want [it] to get around" that sudden vacuum
 18 failures have occurred in Chart tanks, that could make PFC's reliance on manual monitoring alone
 19 seem more like a reasonable interim measure to a jury and less like negligence. PFC apparently did not
 20 believe it was possible for a tank to lose vacuum and fail overnight, and that belief appears more
 21 reasonable when viewed alongside an email chain where a Chart employee and a Chart authorized
 22 distributor express great surprise that a customer's tanks would suddenly lose their vacuum insulation.

23
 24 Dated: May 23, 2021

Respectfully submitted,

25 By: /s/ Amy M. Zeman

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